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MOHAMED ZAHID YON MOHAMED FUAD & ANOR v. FAT BOYS RECORDS SDN BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
S NANTHA BALAN JCA
B SEE MEE CHUN JCA
[CIVIL APPEAL NOS: W-02(IM)(NCC)-370-02-2021, W-02(IM)(NCC)-371-02-2021, W-02(IM)(NCC)-372-02-2021, W-02(IM)(NCC)-408-02-2021, W-02(IM)(NCC)-409-02-2021 & W-02(IM)(NCC)-410-02-2021]
C 2 JUNE 2022

Abstract – *An Anton Piller order ('APO') is a draconian order akin to one of the law's two nuclear weapons for which the pre-requisites or requirements set out must be complied with. The test for an APO is that* D *of an extremely strong prima facie case. The duty of the applicant to make a full and frank disclosure of relevant material facts is contained in O. 29 r. 1(2A) of the Rules of Court 2012, and non-compliance of the latter would necessitate the ex parte Anton Piller order to be set aside.*

E ***CIVIL PROCEDURE:*** *Judgments and orders – Anton Piller order – Setting aside – Application for – Application to set aside ex parte Anton Piller order – Test for Anton Piller order – Whether that of extremely strong prima facie case – Whether there was full and frank disclosure of relevant material facts – Whether Anton Piller order sought a genuine remedy or act of malicious revenge and retaliation – Rules* F *of Court 2012, O. 29 r. 1(2A)(e)*

CIVIL PROCEDURE: *Setting aside – Application for – Application to set aside ex parte Anton Piller order – Test for Anton Piller order – Whether that of extremely strong prima facie case – Whether there was full and frank disclosure of relevant material facts – Whether Anton Piller order sought a genuine remedy or act of* G *malicious revenge and retaliation – Rules of Court 2012, O. 29 r. 1(2A)(e)*

Pursuant to a consolidation order, there were several appeals heard together before the court: Appeals 370, 371, 408 and 410. All were inter-related and arose from two decisions of the High Court Judge ('HCJ') in dismissing the H appellants' applications to set aside an *ex parte Anton Piller* order ('APO') and granting the respondent's application for an *inter parte* APO. The respondent in all appeals was a company carrying out businesses relating to hosting, performance and studio recording. In Appeals 370 and 371, the first appellant ('Zahid') was the Chief Executive Officer ('CEO') of the respondent from 2007 until his suspension on 28 March 2019. He was also I a director and shareholder. The second appellant ('FBSB') was a company whose nature of business was the production, producing and event management of which Zahid was its sole shareholder and director. In

Appeals 408 and 410, the first appellant ('FBGSB') was a company whose activities were television programming and broadcasting, video and television programme production, organisation, promotions and/or management of events while the second appellant ('Munir') was the sole shareholder and director of FBGSB. One of the co-founders of the respondent was Jason Jonathan Lo ('Jason') and he was the CEO from 27 September 2001. Sometime in July 2007, Jason left the respondent and resigned as CEO and director of the respondent. Jason's 70% shares were held by Yakub Hussaini ('Yakub') *via* a declaration of trust. Zahid was appointed the CEO and held 40% while Yakub was appointed as director and held 60%. As the CEO, Zahid was in charge of and responsible for the management of the respondent. The respondent appointed PKF Covenant Sdn Bhd ('PKF') to investigate the respondent's financial activities from financial year end (FYE) 2015 to 2018. In October 2018, Zahid found out that Jason was appointed as director of the respondent through a shareholder's written resolution and directors' resolution dated 9 July 2018. According to Zahid, these resolutions were never approved by him as one of the shareholders and directors of the respondent. Several suits were filed by Zahid to void and invalidate the appointment of Jason as a director leading to the current fourth suit, which was filed by the respondent against all the appellants. As against Zahid, it was for breach of director's duty such as unauthorised issuance of his own salary; unauthorised increment of his salary and bonuses; excessive and unverified claims; unlawful financial assistance to himself; created competition in FBSB and FBGSB; misappropriation of assets; caused the freezing of monies in CIMB bank account; caused liability to the respondent against the Inland Revenue Board ('IRD') and the initiation of the RHB suit against the respondent. As against FBSB and FBGSB, it was for trademark infringement and passing off. It was further pleaded conspiracy as against all the appellants to injure the respondent. Arising from the fourth suit, an *ex parte* APO was granted and three premises were ordered to be searched. Three sets of supervising solicitors ('SS') were appointed in respect of the execution of the APO for all premises. Along with the *inter parte* proceedings (encl. 3), the HCJ also heard the applications to set aside by both sets of appellants (encls. 26 and 28). The HCJ granted encl. 3 and dismissed encls. 26 and 28. In Appeals 370 and 371, the appellants submitted that the broad areas of contention were on abuse of process in that the APO was applied for with a motive to maliciously target Zahid as revenge and retaliation and not as a genuine remedy; no full and frank disclosure and misleading averments. The revenge and retaliation were because of criminal breach of trust (CBT) charges against Jason and Yakub which Jason said were orchestrated by Zahid. It was further contended that the respondent did not have an extremely strong *prima facie* case required to secure the APO and instead relied on a good arguable case. The alleged breaches of directors' duties on unauthorised salaries and bonuses or excessive unverified claims

were expenses incurred in the ordinary course of the respondent's business and were consented to by the shareholders. There was no competition with the respondent and no passing off or infringement of trademark nor conspiracy. There was also a delay in filing the *inter parte* application of almost a year which did not support the urgency of the *ex parte* application. Further, there was an attempt to vary the APO contrary to the terms, which warranted the setting aside. For Appeals 408 and 410, it was submitted that the respondent had not met the requirements to secure the *ex parte* APO. The reasons advanced were inordinate delay, failure to make full and frank disclosure, documents could have been obtained by discovery, no extremely strong *prima facie* case and no evidence the appellants would be destroying evidence. The respondent, however, submitted that it had made out a strong *prima facie* case against the appellants and that there were breaches by Zahid of his director's duty where PKF was appointed to investigate the respondent's financial activities during his tenure. According to the respondent, Zahid had also incorporated FBSB and assisted in creating FBGSB which were competitors to the respondent. Zahid had also allegedly misappropriated the respondent's assets by, *inter alia,* removing accounting documents, company and secretarial documents, computers and laptops and that the acts above showed a *prima facie* case of conspiracy to injure the respondent. According to the respondent, the APO was an exercise of its rights.

Held (allowing appeals)
Per See Mee Chun JCA delivering the judgment of the court:

(1) An APO is a draconian order akin to one of the law's two nuclear weapons for which the pre-requisites or requirements set out must be complied with. The test for an APO is that of an extremely strong *prima facie* case. The duty of the respondent as the applicant to make a full and frank disclosure was contained in O. 29 r. 1(2A) of the Rules of Court 2012 ('RC'). A reading of the words 'any facts which may lead to the court not to grant the application *ex parte* or at all' in r. 1(2A)(e) must necessarily relate to relevant material facts. Hence, it must not just be the non-disclosure of any facts but relevant material facts. (paras 54, 57, 58 & 59)

(2) In these appeals, there was no full and frank disclosure of relevant material facts. Firstly, there was a non-disclosure of the CBT charges in the Sessions Court against Jason and Yakub which arose from the withdrawal of RM232,500 by way of three cheques from the respondent's RHB account. These cheques were prepared and cashed by Yakub without Zahid's knowledge, as the other signatory of the RHB account. As the money was withdrawn for the purpose of paying tax and part used for another purpose, this was the basis of the CBT charges. This was a relevant material fact as Jason had accused Zahid of being

the person who had orchestrated the CBT charges. The CBT charges gave rise to the issue of whether the APO sought was a genuine remedy or an act of malicious revenge and retaliation against Zahid and by extension, the other appellants. It may also well be that the true nature of the dispute between the parties, in particular Zahid and Jason, was a proxy fight or contest for control over the respondent. (paras 61-64 & 67)

(3) Secondly, there was also non-disclosure of oppressive conduct wherein Zahid's interest as a member of the respondent had been disregarded with regard to the change of signatory to the CIMB account. This was a relevant material fact as it related to the allegation that Zahid was the only person to be blamed over the freezing of the respondent's CIMB bank account. Zahid was the sole signatory of the CIMB account and this was the respondent' main account for all business transactions. The bank signatories were changed without Zahid's knowledge and authorisation by a Board of Directors' resolution to include and authorise Jason as the sole bank signatory. Further, the Notice of Board Meeting did not contain a specific agenda to change the CIMB account bank signatory. These were red flags to Zahid and hence it would be reasonable for him to lodge a police report and to inform CIMB that there was an ongoing boardroom dispute. The respondent's oppressive conduct in this matter was indeed a relevant material fact to be disclosed as it addressed head on the allegation that Zahid was the one to be blamed for the CIMB account being frozen. If such oppressive conduct had been disclosed, it may well have led to the inference that Jason was to be blamed. (paras 68-70)

(4) It could not be gainsaid that the terms of O. 29 r. 1(2A) of the RC must be strictly complied with. It followed that non-compliance of O. 29 r. 1(2A)(e) of the RC requiring full and frank disclosure of relevant material facts in the form of the CBT charges and the respondent's oppressive conduct, which must necessitate the *ex parte* APO to be set aside. As a consequence, the *inter parte* application must be dismissed. (paras 71 & 74)

(5) The setting aside of the *ex parte* APO was all the more compelling when viewed against the delay in filing the fourth suit and the application for *inter parte*. In filing the fourth suit, the respondent had relied on the PKF report which was completed on 5 November 2019. There was a delay of almost ten months which did not support the urgency of the *ex parte* application. The delay also showed that there was no real possibility the appellants may destroy the evidence in their possession. The HCJ therefore erred and was plainly wrong in allowing the *inter parte* application for APO and in dismissing the applications to set aside the *ex parte* APO. (paras 75, 77 & 81)

Case(s) referred to:
Anton Piller KG v. Manufacturing Processes Ltd And Others [1976] 1 All ER 779 ***(refd)***
Apparatech (M) Sdn Bhd v. Ng Hock Chong & Anor [2006] 1 CLJ 60 HC ***(refd)***
Arthur Anderson & Co v. Interfood Sdn Bhd [2005] 2 CLJ 889 CA ***(refd)***
Brink's Mat Ltd v. Elcombe And Others [1988] 1 WLR 1350 ***(refd)***
Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors [2019] 7 CLJ 395 FC ***(refd)***
Montreal Trust Co of Canada v. Call-Net Enterprises Inc et al [2002] O.T.C. 60 ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 29 r. 1(2A)(e)

(Civil Appeal Nos: W-02(IM)(NCC)-370-02-2021, W-02(IM)(NCC)-371-02-2021 & W-02(IM)(NCC)-372-02-2021)
For the appellants - Abdul Rashid Ismail & Gabrielle Su May Ee; M/s Rashid Zulkifli
For the respondent - Choo Dee Wei & Azzuan Shah Abdul Razak; M/s Choo Dee Wei

(Civil Appeal Nos: W-02(IM)(NCC)-408-02-2021, W-02(IM)(NCC)-409-02-2021 & W-02(IM)(NCC)-410-02-2021)
For the appellants - Shafrin Halim & Syazwan Halim; M/s Halim & Ismail
For the respondent - Choo Dee Wei & Azzuan Shah Abdul Razak; M/s Choo Dee Wei

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No.: WA-22NCVC-472-09-2020 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

See Mee Chun JCA:

Introduction

[1] Pursuant to a consolidation order dated 29 March 2021, there are six appeals heard together before the court. They are appeals 370, 371, 372, 408, 409 and 410. All are inter-related and arise from two decisions of the High Court Judge (HCJ) in dismissing the appellants/defendants' applications to set aside an *ex parte Anton Piller* order (APO) and granting the respondent/plaintiff's application for an *inter parte* APO.

[2] Appeals 372 and 409 which deal specifically with the HCJ decision in refusing stay, were withdrawn on hearing day.

[3] We allowed the appeals and give our reasons as follows.

Parties

[4] The respondent in all appeals is a company carrying out businesses relating to hosting, performance and studio recording.

[5] In appeals 370 and 371, the first appellant (Zahid) was the chief executive officer (CEO) of the respondent from 2007 until his suspension on 28 March 2019. He is also a director and shareholder. The second appellant (FBSB) is a company whose nature of business is the production, producing and event management of which Zahid is its sole shareholder and director.

[6] In appeals 408 and 410, the first appellant (FBGSB) is a company whose activities are television programming and broadcasting, video and television programme production, organisation, promotions and/or management of events. The second appellant (Munir) is the sole shareholder and director in FBGSB.

Background Facts

[7] One of the co-founders of the respondent was Jason Jonathan Lo (Jason) and he was the CEO from 27 September 2001. Zahid was appointed as director on 12 August 2003. On 16 February 2006, Jason held 70% shares and Zahid 30%. Sometime in July 2007, Jason left the respondent to be the CEO of Tune Talk Sdn Bhd (Tune Talk) and he resigned as CEO and director of the respondent. Jason's 70% shares were held by Yakub bin Hussaini (Yakub) *via* a declaration of trust. Zahid was appointed the CEO. Yakub was appointed as director on 11 March 2009. From 5 December 2017, Zahid held 40% and Yakub 60%.

[8] As the CEO, Zahid was in charge of and responsible for the management of the respondent. Zahid was also the sole signatory of the respondent's CIMB Bank Berhad (CIMB) account which is the respondent's main account for all business transactions and the Bank Kerjasama Malaysia Berhad (Bank Rakyat) account. He and Yakub were both signatories to the RHB Bank account which either one may sign.

[9] The respondent had appointed PKF Covenant Sdn Bhd (PKF) to investigate the respondent's financial activities from financial year end (FYE) 2015 to 2018.

Proceedings In The High Court

First Suit

[10] In October 2018, Zahid found out that Jason was appointed as director of the respondent through a shareholder's written resolution and directors' resolution dated 9 July 2018. According to Zahid, these resolutions were never approved by him as one of the shareholders and directors of the respondent.

[11] On 5 November 2018, Zahid filed Originating Summons No. WA-24NCVC-2254-2018, subsequently changed to WA-24NCC-589-11-2018 (first suit) to void the appointment of Jason as a director. On 9 November 2018 the court allowed an *ex parte* interim injunction against Jason to restrain

him from holding himself out as director or carrying out any act or action as director. On 22 November 2018 a consent order was recorded where Jason was to resign as director without admission of liability as to the validity of the appointment, PKF to proceed with the forensic audit of the respondent's accounts and the costs to be borne equally between Jason and the respondent and the directors' resolution passed on 25 October 2018 to suspend Zahid as CEO was set aside.

Second Suit

[12] Zahid came to know that Yakub had appointed Jason on 7 January 2019 as director of the respondent.

[13] On 25 January 2019, Zahid filed Originating Summons No. WA-24NCC-43-01-2019 (second suit) to invalidate Jason's appointment as director. The second suit was dismissed by the High Court on 6 March 2019, the appeal to the Court of Appeal dismissed on 7 November 2019 and leave to appeal to the Federal Court dismissed on 23 June 2020.

Third Suit

[14] On 24 July 2019, Zahid filed Originating Summons No. WA-24NCC-399-07-2019 (third suit) against the respondent and Yakub for oppressive conduct. On 24 September 2019, the respondent filed a notice of application for the third suit to be continued as a writ. The application was dismissed by the High Court on 25 September 2019. The respondent filed an appeal which has since been withdrawn.

[15] The third suit is ongoing.

Current Fourth Suit

[16] On 28 September 2020, the respondent filed Civil Suit No. WA-22NCC-472-09-2020 (fourth suit) against all the appellants.

[17] As against Zahid, it was for breach of director's duty such as unauthorised issuance of his own salary; unauthorised increment of his salary and bonuses; excessive and unverified claims; unlawful financial assistance to himself; created competition in FBSB and FBGSB (assisted Munir); misappropriation of assets; caused the freezing of monies in CIMB; caused liability to the respondent against the Inland Revenue Board (IRD) and the initiation of RHB suit against the respondent.

[18] As against FBSB and FBGSB, it was for trademark infringement and passing off.

[19] It was further pleaded conspiracy as against all the appellants to injure the respondent.

Ex Parte APO

[20] Arising from the fourth suit, an *ex parte* APO was granted on 9 October 2020 and amended on 14 October 2020. As per Schedule A of the APO, three premises were ordered to be searched; namely premises 1 (Zahid's residential address), premises 2 (FBSB's business address) and premises 3 (FBGSB's business address).

[21] The items to be seized and searched are both in physical and electronic format as per Schedule B of the APO. These included but were not limited to the respondent's assets including equipment and documents), FBSB and FBGSB list of clients, human resources documents, project listing, Zahid's emails and FBSB and FBGSB secretarial documents.

Execution Of Ex Parte APO

[22] Three sets of supervising solicitors (SS) were appointed in respect of the execution of the APO for all premises.

[23] Execution on premises 1 was conducted on 15 October 2020, could not be executed on premises 2 and on premises 3 on 15 October 2020, 16 October 2020 and 19 October 2020. Physical documents were seized. Electronic data were imaged by Virdos Lima Consultancy (M) Bhd (Virdos), the forensic IT company, from Zahid's handphone and IPad and 25 devices in premises 3 comprising of laptops and computers.

Inter Parte Proceedings And Applications To Set Aside

[24] Along with the *inter parte* proceedings (encl. 3), the HCJ also heard the applications to set aside by both sets of appellants (encl. 26 by Zahid and FBSB and encl. 28 by FBGSB and Munir). On 19 February 2021, the HCJ granted encl. 3 and dismissed encls. 26 and 28.

HCJ's Grounds

[25] The HCJ's brief grounds are as follows:

> Encl. 3:
>
> brief main reasons includes among others – having considered the affidavit evidence adduced by the parties including the reports submitted by the Supervising Solicitors and the parties' submissions therein, I am satisfied that the respondent has fulfilled the legal threshold for the granting of an *inter partes Anton Piller* order which includes, among other,
>
> - the affidavit evidence shows the P has an extremely strong *prima facie* case against the D1-A4
> - considering the factual circumstances as whole: the respondent would suffer very serious damage if the APO is not granted and there is a real possibility that the defendant may destroy documents/materials in particular the electronic data that were imaged during execution of the *ex parte* APO dated 9/10/2020 at A1 Premises and A3 Premises which has yet to be duly processed

A - and the documents and equipment seized at A3 Premises during execution of the *ex parte* APO which has yet to be jointly itemised.

Encl. 3 is allowed with cost

Encl. 26 & 28:

B main brief reasons include, among others that the non-disclosure as contended by the A1 – A4 is not material as to have caused this court to be misled when granting the *ex parte* AP dated 9/10/2020

[26] As noted in para. 28 of the respondent's submission dated 14 September 2021, the above is taken from a screenshot of the e-review C session when the HCJ delivered decision.

Submissions Of The Appellants (Appeals 370 And 371)

[27] The dispute between Jason and Zahid began when Jason offered three options in relation to the shares of the respondent wherein the shares of the respondent were worth much less than the valuation proposed. D

[28] The broad areas of contention were on abuse of process in that the APO was applied for with a motive to maliciously target Zahid as revenge and retaliation and not as a genuine remedy; no full and frank disclosure; and misleading averments.

E **[29]** The revenge and retaliation were because of criminal breach of trust (CBT) charges against Jason and Yakub which Jason said were orchestrated by Zahid.

[30] The true purpose and intent of the APO was evident from the press conference given by Jason after he was charged on 1 September 2020. The F fact that the documents sought in the APO could have been obtained by discovery fortifies the intention of Jason to exact revenge and retaliation,

[31] Further, the CBT charges and Jason's arrest for drug related offences had not been disclosed. The CBT charges are material facts as they show Jason's true intention to seek the APO. The arrest is material as it led to the G breakdown in mutual trust and confidence between Jason and Zahid. There was also non-disclosure of oppressive conduct wherein Zahid's interest as a member of the respondent had been disregarded with regard to the change of signatory to the CIMB account and the harassment of the solicitors.

H **[32]** The misleading averments were *inter alia* Zahid had obstructed PKF without disclosing the full events and had not disclosed that Jason had locked the respondent's premises thereby locking out Zahid and PKF.

[33] It was further contended that the respondent did not have an extremely strong *prima facie* case required to secure the APO and instead relied on a I good arguable case. The alleged breaches of director's duties on unauthorised salaries and bonuses or excessive unverified claims were expenses incurred in the ordinary course of the respondent's business and were consented to by

the shareholders. Since 2009, the audited accounts with the yearly expenditure including salaries and bonuses were presented to Yakub who has been signing them. Yakub being the director primarily responsible for the financial management had signed the statutory declarations the financial statements were correct from 2009 to 2017.

[34] There was no competition with the respondent and no passing off or infringement of trademark nor conspiracy.

[35] The alleged liability towards CIMB, RHB and IRD were attributed to the conduct of Jason. In particular the freezing of the CIMB account was due to the respondent changing the signatory without Zahid's consent.

[36] There was also a delay in filing the *inter parte* application. In filing the fourth suit and encl. 3 on 28 September 2020, the respondent had relied on the PKF report which was completed on 5 November 2019. There was a delay of almost a year which does not support the urgency of the *ex parte* application.

[37] The APO was not necessary when pre-trial discovery could have been applied. The documents sought would also be in the custody of the respondent's company secretary, auditors, ex-employees and in the respondent's premises. There was further no evidence of a real risk of destruction of the evidence.

[38] There was an attempt to vary the APO contrary to the terms, which warranted the setting aside.

Submissions Of The Appellants (Appeals 408 And 410)

[39] It was submitted the respondent had not met the requirements to secure the *ex parte* APO. The reasons advanced were inordinate delay, failure to make full and frank disclosure, documents could have been obtained by discovery, no extremely strong *prima facie* case and no evidence the appellants would be destroying evidence. We note the facts relied on were similar to the appellants in appeals 370 and 371.

[40] It was next submitted there had been a breach of the APO when the respondent had undertaken unilateral itemisation of documents in the absence of the appellants and there was an attempt to vary the terms of the APO when it was not provided for.

Submissions Of The Respondent

[41] It was submitted that the respondent had made out a strong *prima facie* case against the appellants from the face of the pleadings and the affidavits. There were breaches by Zahid of his director's duty where PKF was appointed to investigate the respondent's financial activities during his tenure from FYE 2015 to 2018. Zahid had hindered PKF's investigations by filing the first to third suits. Although the consent order from the first suit stated

A PKF's investigations were to resume without obstruction, Zahid restricted PKF's access to the respondent's premises and the books and records, delayed in furnishing documents, removed files and documents and refused to respond to PKF's request for documents and to fix appointments/ meetings. PKF's report was circulated to all directors including Zahid for B comments who chose to remain silent. Only when the report was finalised to be conclusive was there an objection. He has also never engaged another auditing firm to rebut the PKF report and the report is *prima facie* evidence of his breach of duty as a director.

[42] Zahid had also incorporated FBSB and assisted in creating FBGSB C which were competitors to the respondent. He was alleged to be the CEO of FBGSB. The trademark infringement and passing off were met with only bare denials.

[43] Zahid had misappropriated the respondent's assets by removing accounting documents, company and secretarial documents, human D resources documents, studio equipment, computers and laptops.

[44] The liability towards CIMB, RHB and IRD were on account of the conduct of Zahid.

[45] The acts above would show a *prima facie* case of conspiracy to injure E the respondent.

[46] On the variation to the APO, one of the terms was that the processing of the electronic data shall be conducted in the SS premises 1's office of which Virdos is required to set up mobile workstations therein to commence the processing. As there were 27 electronic devises seized, Virdos would F require at least 16 days for processing. The respondent thus proposed the processing be done at Virdos, in a designated locked room with the key to be held by SS. Virdos agreed to the proposal as did SS for premises 1 and 3. Zahid and FBGSB solicitors replied that client's instructions would need to be procured and finally objected on the basis of it being a variation to the G APO. The processing did not commence.

[47] With regard to the joint itemisation as required by FBGSB, the respondent objected to it as the inventory list prepared was sufficient to be identified. Subsequently, FBGSB's new solicitor objected to the joint itemisation and that it was a variation of the APO. This inconsistent stand H showed the appellants have something to hide.

[48] There would be serious damage to the respondent's case if it is unable to ascertain the true figure and the detailed amount of equipment and documents misappropriated.

I **[49]** Although the respondent did not disclose the facts as stated by the appellants, it was submitted the requirement of full and frank disclosure is only in respect of material facts which would affect the granting of the APO. The CBT charges are immaterial as it does not affect Zahid's liability in

relation to the RHB account. The same goes for the change of signatory where the freezing of the CIMB account was caused by Zahid. Jason's arrest was never averred in any of the affidavits. In any event, the arrest has nothing to do with the management of the respondent and does not permit Zahid's breaches as a director. The harassment of the solicitors was never averred as a non-disclosure and is not material and relevant to the granting of the APO.

[50] The delay was not substantial and was caused by attempts for an amicable settlement which were unsuccessful. In any event, attempts for an amicable settlement are justifiable reason for the delay as per the Federal Court in *Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors* [2019] 7 CLJ 395; [2019] 5 MLJ 1.

[51] The APO is an exercise of the respondent's rights. Further, when APO is viewed as against discovery, an APO is to preserve evidence necessary for its case especially when the appellants conduct have demonstrated a danger of the listed items being concealed and/or destroyed.

[52] There were no misleading averments. It was Zahid who obstructed PKF where even PKF's advisor had averred in affidavits in the third suit and stated in the SS's reports. On the handover of assets, the fact that many documents were discovered through the execution of the APO would show no proper handover. Although Jason did lock up the respondent's premises, this was after Zahid's suspension. The issue pertains to the locking up during Zahid's tenure as CEO.

Our Decision

[53] As can be seen from the submissions of parties, many issues were raised to support or oppose the appeals. We do not propose to deal with each and every single one of them. It suffices if we only deal with what we consider to be the critical issues which form the basis for our decision.

Requirements For An APO

[54] We begin with the test for an APO which is that of an extremely strong *prima facie* case. This has been laid out in the case from which the order for *Anton Piller* derives its name. In *Anton Piller KG v. Manufacturing Processes Ltd And Others* [1976] 1 All ER 779 this was stated at p. 784:

> ... The proposed order is at the extremity of this court's powers. Such orders, therefore, will rarely be made, and only when there is no alternative way of ensuring that justice is done to the plaintiff.
>
> There are three essential pre-conditions for the making of such an order, in my judgement. First, there must be an extremely strong *prima facie* case. Secondly, the damage, potential or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application *inter partes* can be made.

[55] The same was said by this court in *Arthur Anderson & Co v. Interfood Sdn Bhd* [2005] 2 CLJ 889; [2005] 6 MLJ 239 at p. 905 (CLJ); p. 253 (MLJ):

> [31] It is settled that the basic requirements to be satisfied by an applicant for an *Anton Piller* order at an *ex parte* stage are as follows:
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> (a) to disclose an extremely strong *prima facie* case,
>
> (b) that a refusal to grant the order will have a very serious effect to the applicant,
>
> (c) that it must be established that the defendant has in its possession the relevant documents and/or materials being sought for and that there is a real possibility that the defendant may destroy such documents and/or materials,
>
> (d) that the applicant is required to make a full and frank disclosure, and
>
> (e) that the order should contain the necessary undertakings and safeguards to be complied with upon its execution.

[56] At pp. 902 to 903 (CLJ); p. 251 (MLJ), the following was said of the need to follow guidelines and safeguards incorporated in the highly persuasive cases it referred to earlier:

> [25] ... That is plain common sense. Otherwise it would be like arming an applicant with 'one of the law's two 'nuclear' weapons' per Donaldson LJ (as he then was) in *Bank Mellat v. Nikpour* [1985] FSR 87 at p. 90 to be used at his whims and fancies. Thus, we are entirely in agreement with the observation of the learned judge in the case of *Makonka Electronic Sdn Bhd v. Electrical Industry Workers' Union & Ors* when he said:
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> > It is a draconian order, granted by the court upon the balance of undertakings by the applicant and upon specific terms and conditions. Those terms, conditions and undertakings cannot be ignored or left for subsequent compliance at will. Compliance with the terms of the conditions and undertakings are necessary pre-conditions to the enforcement of the order ...

[57] The sum total of these leading authorities is that an APO is a draconian order akin to one of the law's two nuclear weapons for which the pre-requisites or requirements set out must be complied with.

Full And Frank Disclosure Of Relevant Material Facts

[58] The duty of the respondent as the applicant to make a full and frank disclosure is contained in O. 29 r. 1(2A) Rules of Court 2012 (RC 2012) which states the following:

> (2A) The affidavit in support of an application made *ex parte* must contain a clear and concise statement of:
>
> (a) the facts giving rise to the claim;
>
> (b) the facts giving rise to the application for interim injunction;

(c) the facts relied on to justify the application *ex parte*, including details of any notice given to the other party or, if notice has not been given, the reason for not giving notice;

(d) any answer by the other party (or which he is likely to assert) to the claim or application;

(e) any facts which may lead the Court not to grant the application *ex parte* or at all;

(f) any similar application made to another Judge, and the order made on that application; and

(g) the precise relief sought.

[59] A reading of the words "any facts which may lead to the court not to grant the application *ex parte* or at all" in r. 1(2A)(e) must necessarily relate to relevant material facts. Hence it must not just be the non-disclosure of any facts but relevant material facts.

[60] It is noted that in *Arthur Anderson*, a basic requirement as stated in item (d) was a full and frank disclosure. At p. 907 (CLJ); p. 255 (MLJ) the following was stated:

> [40] As expressed by the English courts it is also the law in this country that when applying for an *ex parte* order an applicant is duty-bound to make an honest, full and frank disclosure of all relevant material facts within his knowledge, which failure may be a ground to set aside any order granted.

[61] In these instant appeals, we found there to be no full and frank disclosure of relevant material facts. These are set out as follows.

Non-disclosure Of CBT Charges

[62] Firstly, there was a non-disclosure of the CBT charges in the Sessions Court on 1 September 2020 against Jason and Yakub. These CBT charges arose from the withdrawal of RM232,500 by way of three cheques dated 24 April 2019 from the respondent's RHB account (CBD5/35). These cheques were paid out on 14 May 2019 as evident from the "paid" chop. These cheques were prepared and cashed by Yakub without Zahid's knowledge, as the other signatory of the RHB account. RHB informed Zahid the cheques were cashed for the purpose of paying tax. By Yakub's solicitor letter dated 31 May 2019 (CBD5/47-48), Zahid was informed a part sum of RM58,000 was utilised to pay Jason's salaries for April and May 2019.

[63] As the money was withdrawn for the purpose of paying tax and part used for another purpose, this was the basis of the CBT charges. This was a relevant material fact as Jason had accused Zahid of being the person who orchestrated the CBT charges. The true purpose and intent of the APO may be gleaned from the press conference held by Jason after he had been charged. At CBD4/495 this was said:

A ... so that's why i am here, because this is to do with family, and when you are trying cause CBT on someone, it's a real scary thing because a 20 year, fine, all that, well I think they did the wrong thing because... when you push people that far, when you push someone because you want them to get arrested you are only thinking one step ahead., and you forget that, I have this. (Referring to the PKF Forensic Report in hand) Now I have no choice but to throw this down. I have no choice. I don't want to send anyone to prison but., my family is not going to lose me., because I didn't do anything wrong. I think you., and I speak of nicely over here., you and your father and your uncle., your uncle who was there before and advised you can talk as big as he wants but we're coming after you soon.

And I think we know what's coming. You all know what's coming. A lot of you want me to do this and I have no choice but to do it, but I do it reluctantly. I don't want anyone to experience what I experience, anyone. I don't even want people who did this to me to experience it, but it's coming and there's gonna be no way to stop it now. I do it reluctantly but unfortunately sometimes we have to do this because these are the building blocks for the future.

And if we don't stop white collar crime, it's gonna get worse and families will break up and there's gonna be more pain, so this is all on my plate now. And I hope to God that I can do justice but more importantly that people get reckoning ...

[64] We find that the CBT charges give rise to the issue of whether the APO sought was a genuine remedy or an act of malicious revenge and retaliation against Zahid and by extension, the other appellants.

[65] The respondent did not dispute the CBT charges were not disclosed but that it was not materially relevant. This was because these did not affect Zahid's liability with regard to the RHB account. We have given our reasons above as to why they are relevant material facts.

[66] Further, it is not for the respondent to make the determination of whether what are relevant material facts. That is for the court to decide. This has been held in *Brink's Mat Ltd v. Elcombe And Others* [1988] 1 WLR 1350 at p. 1356 as follows:

In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v. Kensington income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton LJ.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; ...

[67] It may also well be that the true nature of the dispute between the parties in particular between Zahid and Jason, was a proxy fight or contest for control over the respondent. In the Superior Court of Justice of Ontario, Canada case of *Montreal Trust Co of Canada v. Call-Net Enterprises Inc et al* [2002] O.T.C. 60 (SupCt), Lax J described a proxy fight or contest in the following manner:

> [28] A proxy contest is a struggle for control. It is described in this way by the author of *The Law and Practice of Canadian Business Corporations*:
>
> > A proxy contest or proxy fight is a struggle for control, almost always within an offering corporation, in which the combatants are the existing management group of directors within the corporation and non-management group, who are often called the insurgents. The object of each group is to gain control of sufficient proxies to elect a majority of the board of directors and thereby secure control of the corporation.

Non-disclosure Of Oppressive Conduct

[68] Secondly, there was also non-disclosure of oppressive conduct wherein Zahid's interest as a member of the respondent had been disregarded with regard to the change of signatory to the CIMB account. This is a relevant material fact as it relates to the allegation that Zahid is the only person to be blamed over the freezing of the respondent's CIMB bank account.

[69] We noted earlier that Zahid was the sole signatory of the CIMB account and that this was the respondent's main account for all business transactions. The bank signatories were changed without Zahid's knowledge and authorisation by a board of directors' resolution on 25 October 2018 (CBD5/62) to include and authorise Jason as the sole bank signatory. Further, we note the notice of board meeting dated 4 October 2018 (CBD5/81) did not contain a specific agenda to change the CIMB account bank signatory. These were a red flag to Zahid and hence it would be reasonable for him to lodge a police report on 21 February 2019 and to inform CIMB that there was an ongoing boardroom dispute.

[70] The respondent's oppressive conduct in this matter was indeed a relevant material fact to be disclosed as it addressed head on the allegation that Zahid was the one to be blamed for the CIMB account being frozen. If such oppressive conduct had been disclosed it may well have led to the inference that Jason was to be blamed. As it turned out, between 26 November 2019 to 10 July 2020 when Jason and Yakub were managing the respondent, all the funds in CIMB account had been withdrawn. This compares to the available balance of RM1,025,768.58 as at 26 November 2019 (CBD5/85).

Effect Of Non-Disclosure

[71] It cannot be gainsaid that the terms of O. 29 r. 1(2A) RC 2012 must be strictly complied with.

[72] We had earlier referred to *Arthur Anderson* at p. 907 (CLJ); p. 255 (MLJ) where the failure to disclose all relevant material facts may be a ground to set aside.

[73] The High Court in *Apparatech (M) Sdn Bhd v. Ng Hock Chong & Anor* [2006] 1 CLJ 60; [2006] 2 MLJ 61 at p. 77 (CLJ); p. 73 (MLJ) referred to a judgment of Clement Skinner J who in turn referred to Gopal Sri Ram JCA:

> [40] Clement Skinner J in *UMAS Sendirian Berhad v. RHB Bank Berhad & Anor* [2001] 1 AMR 1024 emphasised the need to comply strictly with r. 1(2A) of O. 29 of the RHC and this was what His Lordship said (see p. 1042 of the report):
>
> > The consequence of the plaintiff's failure to comply with r. 1(2A) of O. 29 is that the injunction having being obtained in breach of r. 1(2A) which requires strict compliance with its terms, it must be discharged, to do otherwise would defeat the policy behind the introduction of r. 1(2A). To this end I would refer to the clear direction of the Court of Appeal to High Court judges in this particular regard in the case of *Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v. Delcont (M) Sdn Bhd* [1996] 2 MLJ 605. Although that was a case involving the grant of a *Mareva* injunction on an *ex parte* summons, I nevertheless regard what was stated there as applying to all injunctions granted on an *ex parte* basis and binding on me. This is what His Lordship Gopal Sri Ram JCA speaking for the Court of Appeal said at p. 611:
> >
> > > The provisions of O. 29 r. 1(2A) were introduced by amendment in order to ensure that *ex parte* injunctions of any sort were not granted willy-nilly, but only in cases where they were truly called for. In order to ensure that the policy behind the introduction of r. 1(2A) is not defeated, High Courts must demand strict compliance with its terms. More so, when the relief applied for is in the nature of a *Mareva* or an *Anton Piller* type of injunction because of the incalculable harm and damage that may be caused to a defendant by the grant of either of these orders.

[74] It follows that non-compliance of O. 29 r. 1(2A)(e) RC 2012 requiring the frank and full disclosure of relevant material facts in the form of the CBT charges and the respondent's oppressive conduct, which must necessitate the *ex parte* APO to be set aside. As a consequence, the *inter parte* application must be dismissed.

Delay

[75] The setting aside of the *ex parte* APO is all the more compelling when viewed against the delay in filing the fourth suit and the application for *inter parte*. In filing the fourth suit and encl. 3 on 28 September 2020, the respondent had relied on the PKF report which was completed on 5 November 2019. There was a delay of almost ten months which does not support the urgency of the *ex parte* application.

[76] Jason had averred that the fourth suit was supposed to be a counterclaim in the third suit. The respondent had applied for the third suit to be converted into a writ and to include a counterclaim. The application was dismissed on 25 September 2019. When it was dismissed, the respondent ought to have filed the fourth suit immediately as it was ready to proceed against the appellants.

[77] The delay would also show there was no real possibility the appellants may destroy the evidence in their possession.

[78] The respondent said any delay was caused by attempts for an amicable settlement which was unsuccessful. It referred to *Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors* [2019] 7 CLJ 395; [2019] 5 MLJ 1 which held that attempts for an amicable settlement is a justifiable reason for delay. At p. 439 (CLJ); p. 38 (MLJ), this was said:

> [86] ... With respect, the Court of Appeal fell into error on the issue of delay. We are satisfied that the alleged delay is explicable and the forbearance of parties who are in the midst of settlement negotiations is an acceptable and satisfactory explanation in the circumstances of this case. It would be unreasonable for the appellant to rush off to the court the moment the disputes arose. He had ongoing relationship with the respondents and negotiations towards settlement of the disputes and we can understand as did the learned High Court judge, the reluctance on the part of the appellant to file the application for injunction. We accept such reluctance was for good reasons premised on a commercial reality.

[79] We note that *Jaya Sudhir* dealt with an injunction to restrain the respondents from proceeding and continuing with on-going and parallel arbitration commenced by the first respondent against the second and third respondents and an originating summons. The considerations for delay may well differ in such instances.

[80] Further, when there is discussion for settlement, this would show there was no fear of destruction of evidence. We also considered that when the settlement failed, the situation was unlikely to have changed in terms of the risk of destruction of evidence.

A *Appellate Intervention Warranted*

[81] For the reasons given above, we are constrained to find that the HCJ had erred and was plainly wrong, as per *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67, when allowing the *inter parte* application for APO and in dismissing the applications to set aside the *ex parte* APO.

B

Conclusion

[82] We allow appeal 370. The decision of the HCJ dated 19 February 2020 is set aside and substituted with an order in terms of prayers 1, 2, and 3 of encl. 26 and damages to be assessed.

C

[83] We allow appeal 371. The decision of the HCJ dated 19 February 2020 is set aside and substituted with encl. 3 is dismissed.

D **[84]** We allow appeal 408. The decision of the HCJ dated 19 February 2020 is set aside and substituted with an order in terms of prayers 1, 2, and 3 of encl. 28 and damages to be assessed.

[85] We allow appeal 410. The decision of the HCJ dated 19 February 2020 is set aside and substituted with encl. 3 is dismissed.

E

[86] Appeals 372 and 409 on the refusal for stay are struck out with no order as to costs.

[87] We award costs of RM10,000 each, here and below for appeals 370 and 408. We award costs of RM20,000 each, here and below for appeals 371 and 410. All costs are subject to allocator.

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